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SUPREME COURT OF PENNSYLVANIA

JANUARY TERM, 1946

No. 181

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

STATEMENT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES

(a) Statutory Provision Believed to Sustain Jurisdiction

Jurisdiction is invoked under Section 237(a) of the Judicial Code (28 U. S. C. A. Sec. 344a) and Section 2 of Rule 46 of the Revised Rules of the Supreme Court of the United States, in that there is drawn in question the validity of certain statutes of the Commonwealth of Pennsylvania, on the ground that said statutes, as construed by the Supreme Court of Pennsylvania, the highest court of said State in which a decision in the suit could be had, are repugnant to the Constitution and laws of the United States.

(b) The Statutes of Pennsylvania, the Validity of Which Is Involved

The Statutes of the Commonwealth of Pennsylvania, the validity of which is involved in this proceeding, is the Act of July 26, 1913, P. L. 1374 (as amended by the Act of June 12,

1931, P. L. 530), and the Act of May 28, 1937, P. L. 1053, the pertinent provisions of which are set out verbatim as follows:

Article V, Section 3, of the Act of July 26, 1913, P. L. 1374

"Whenever the Commission shall determine, after hearing, and upon its own motion, or upon complaint, that the rates * * * collected by any public service company * * * are unjust or unreasonable * * * then the Commission shall determine, and prescribe by a specific order, the maximum just, due, equal, and reasonable rates * * * to be thereafter * * * collected for the service to be performed."

Article V, Section 5, of the Act of July 26, 1913, P. L. 1374

"If * * * the Commission shall determine that any rates which have been collected * * * by any public service company complained of, were in violation of any order of the Commission, or were unjust and unreasonable, or unjustly discriminatory, or unduly or unreasonably preferential; * * * the Commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of such unjust, unreasonable, or unlawful collections, * * * of such public service company: provided, that such damages have been actually sustained by such complainant petitioner.

* * * * * * *

No reparation, as herein provided, shall be awarded by the Commission unless the complaint or petition shall have been filed with it within two years from the time when the cause of action accrued * * *."

Article VI, Section 22, of the Act of July 26, 1913, P. L. 1374, as amended by the Act of June 12, 1931, P. L. 530

"At the hearing of the appeal, the said (Superior) Court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law: Provided, however, That in every appeal taken, including those already taken and undetermined, involving a question of the reasonableness of rates, whether such appeal shall have been taken by a complainant or by a public service company, it shall be the duty of the court to consider the entire record of the proceedings before the commission, including the testimony, and, on its own independent judgment, to determine whether or not the findings made and the valuations and rates fixed by the commission are reasonable and proper. If the court shall determine that the findings or the valuations are unreasonable, or that the rates fixed are unreasonably high, it shall remit the case to the commission with directions to reform the findings, valuations, and rates in accordance with the court's opinion."

Article III, Section 313 (a) of the Act of May 28, 1937, P. L. 1053

"(a) If, in any proceeding involving rates, the commission shall determine that any rates received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within two years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. * * * Any order of the commission awarding a refund shall be made for and on

behalf of all patrons subject to the same rate of the public utility."

(c) Date of Judgment Sought to Be Reviewed and Date of Presentation of Petition for Allowance of Appeal

The date of the final judgment of the Supreme Court of Pennsylvania which is sought to be reviewed is December 2, 1946.

Petition of petitioner for re-argument before said Court was refused under date of January 7, 1947.

The date upon which the petition for allowance of appeal to the Supreme Court of the United States is being presented to the Chief Justice of the Supreme Court of Pennsylvania is February 21, 1947.

(d) Nature of Case and Cases Believed to Sustain Jurisdiction

The judgment of the Supreme Court of Pennsylvania which petitioner is endeavoring to have reviewed by the Supreme Court of the United States, holds that petitioner is liable for reparations for collecting rates previously approved by the Public Service Commission of Pennsylvania in a rate proceeding, as reasonable and proper.

The said judgment of the Supreme Court of Pennsylvania also holds that the question of who is entitled to damages is a procedural one and that therefore the provisions of the Public Utility Law of 1937 apply rather than those of the Public Service Company law of 1913, contrary to the contention of petitioner that the said question is definitely substantive and that to refuse to apply the provisions of the Public Service Company Law of 1913, which provides that only such complainant petitioners as have actually sustained damages and who have filed their complaint or petition within two years of the time when the

cause of action accrued, are entitled to reparations, amounts to confiscation and contravenes Section 1, Amendment XIV of the Constitution of the United States in that it deprives the petitioner of its property without due process of law and further denies to petitioner the equal protection of the laws.

Cases relied upon to sustain jurisdiction are *Bluefield etc. Improvement Co.* v. *Public Service Commission,* 262 U. S. 679, 683, 43 S. Ct. 675, 67 L. Ed. 1176; *Northern Pacific Railway Co., et al.* v. *Department of Public Works of State of Washington, et al.,* 268 U. S. 39; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, and cases cited; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

(e) Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The questions involved in this appeal are substantial in that the determination thereof by the Supreme Court of Pennsylvania contravenes the Fourteenth Amendment of the Constitution of the United States and is contrary to applicable decisions of the United States Supreme Court.

In support of this contention petitioner submits that inasmuch as the rates here involved were prescribed by the Public Service Commission of Pennsylvania, acting in its quasi legislative capacity in a rate proceeding, and remained unchallenged for a period of approximately three and one-half years from their effective date, the determination by the Commission in a subsequent reparation proceeding, acting in its quasi-judicial capacity, wherein it ignores its own pronouncement promulgated in its quasi legislative capacity and retroactively repeals its own enactment as to the reasonableness of the rates it has prescribed, and the affirmation thereof by the Supreme Court of Pennsylvania, amounts to confiscation of the property of the peti-

tioner without due process of law and denies to it the equal protection of the laws and is contrary to an applicable decision of the United States Supreme Court in the case of *Arizona Grocery Co.* v. *Atchison, Topeka and Sante Fe Railway Co.*, 284 U. S. 270, and to other closely analogous decisions of the said Court in the cases of *Forbes Boat Line* v. *Commissioners*, 258 U. S. 338; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440; *Calder* v. Bull, 3 Dall. 385, 388, 391; *Murray's Lessee* v. *Land Co.*, 18 How. 272, 276, 277; *Hurtado* v. *Calif.*, 110 U. S. 516, 535, 536; *Twining* v. *New Jersey*, 211 U. S., 78, 101, 102.

Petitioner further submits that the determination of the Supreme Court of Pennsylvania to the effect that the question as to who is entitled to reparations is one of procedure rather than one of substance and that it should be determined in accordance with the provisions of the Public Utility Law of 1937 rather than under the provisions of the Public Service Company law of 1913, in spite of the fact that this proceeding had its inception on October 17, 1935, more than a year and a half prior to the effective date of the Public Utility Law of 1937, also amounts to confiscation of its property without due process of law and denies to it the equal protection of the laws for the reason that under the provisions of the Public Service Company Law of 1913 only such complainant petitioners who have actually sustained damages and who have filed their complaint or petition within two years from the time when the cause of action accrued, are entitled to reparations, whereas the Public Utility Law of 1937 provides that any order of the Commission awarding reparations shall be made for and on behalf of all patrons subject to the same rate of the public utility involved.

(f) Stage in Proceedings Before Commission and in the Appellate Courts at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised and the Method of Raising Them; and How Disposed of.

The Federal questions sought to be reviewed were first raised by way of exceptions to the order nisi of the Public Service Commission in this proceeding entered January 3, 1940, said exceptions being as follows:

> (1) "Respondent excepts generally to the entire order nisi of the Commission because said order is arbitrary, unlawful and in contravention of the Fourteenth Amendment of the Constitution of the United States and of the First and Tenth Sections of the First Article of the Constitution of Pennsylvania." (Record 200a)
>
> (4) "Respondent excepts to the order nisi of the Commission because the said order is against the law." (Record 201a)

The federal questions were again raised in the brief filed with the said Commission by appellant sur the said exceptions to the order nisi (Record p. 214a).

The Commission disposed of said exceptions in its order of September 23, 1940, as follows:

> "1, 2, 3, 4—these exceptions are general in character and allege the order nisi to be unlawful, unconstitutional and arbitrary, against the weight of the evidence, and against the law. We perceive no merit in these exceptions, and they will be dismissed." (Record p. 228a)

The federal questions were again raised in the specifications of error assigned by appellant in its petition in appeal

to the Superior Court of Pennsylvania from the order of the Commission of September 23, 1940, as follows:

> "The Commission erred in dismissing exceptions Nos. 1, 2, 3 and 4 to its order nisi" (Record p. 241a).

The federal questions were again raised in the assignment of error No. 2 filed by the appellant with the Superior Court of Pennsylvania wherein appellant complained the Commission erred in dismissing its exceptions 1, 2, 3 and 4 to the Commission's order nisi, which assignment of error was expressly overruled by the Superior Court in its opinion of October 2, 1941, (146 Pa. Superior Ct. 274, 22 A. 2d 37), without discussion, as follows:

> "The ninth, tenth, eleventh and twelfth assignments of error, in so far as they relate to dismissal of appellant's twentieth and thirtieth exceptions to the order nisi of the commission, are sustained. The remaining assignments of error are overruled."

The said federal questions were also discussed by appellant in its brief filed with the Superior Court of Pennsylvania.

The federal questions were again raised in assignment of error No. 1 filed by appellant with the Supreme Court of Pennsylvania wherein appellant complained that the Superior Court erred in failing to sustain assignment of error No. 2 filed with it by appellant as aforesaid; but the Supreme Court of Pennsylvania made no specific disposition of said assignment of error in its opinion.

That appellant again raised the federal questions involved in paragraph 11 of its petition for reargument filed with the Supreme Court of Pennsylvania under date of March 30, 1942, in the following manner:

> "(11) That your petitioner is advised, believes and therefore avers that the finding and determination of

your Honorable Court as set forth in the said opinion of March 23, 1942, to the effect that your petitioner is liable for reparations is arbitrary, unlawful and in contravention of the Fourteenth Amendment of the Constitution of the United States and of the First and Tenth Sections of the First Article of the Constitution of Pennsylvania, and is particularly contrary to the principle enunciated by the Supreme Court of the United States in Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370, 52 S. Ct. 183, 76 L. ed. 384."

but said petition was refused without comment under date of April 13, 1942.

The federal question was again raised by petitioner in exception No. 8 (printed record p. 530a) filed by it to the order of the Pennsylvania Public Utility Commission dated November 13, 1944, in the following manner:

"8. The order of the Commission entered in the above entitled proceeding under date of November 13, 1944, is arbitrary, unlawful and in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it is confiscatory and deprives the respondent of its property without due process of law, denies to respondent the equal protection of the laws and amounts to a taking of the private property of respondent without authority of law."

but said exception was ignored by the said Commission.

The federal question was again raised in exception No. 3 (printed record p. 628a) filed by petitioner to the order entered by the Pennsylvania Public Utility Commission under date of August 6, 1945, in the following manner:

"3. The Order of the Commission entered in the above entitled proceeding under date of August 6, 1945 is in contravention of Section 1 of Amendment

XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it is confiscatory and deprives the respondent of its property without due process of law, denies the respondent the equal protection of the laws and amounts to a taking of the private property of respondent without authority of law."

but said exception was ignored by the said Commission.

The said question was also clearly raised in this cause prior to the final decision of the Supreme Court of Pennsylvania therein, in the following manner:

"(a) Paragraph 19 (h) of the Petition of Appellant for leave to appeal to the Supreme Court of Pennsylvania from the judgment of the Superior Court filed April 17, 1946, provides as follows:

'The findings and determinations as contained in the several orders of the Commission entered in this proceeding, and the affirmation thereof by the Superior Court, are in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that they are confiscatory and deprive the appellant of its property without due process of law, deny to the appellant the equal protection of the laws, and amount to a taking of the private property of appellant without authority of law; and are particularly contrary to the principles enunciated by the Supreme Court of the United States in the case of Arizona Grocery Co. *vs.* Atchison, T. & S. F. Ry. Co., 284 U. S. 370, (52 S. Ct. 183, 76 L. Ed. 384).'

(b) Assignment of Error 11 filed with the Supreme Court of Pennsylvania is as follows:

'11. The affirmation by the Superior Court of the findings and determinations as contained in the sev-

eral orders of the Commission entered in this proceeding are in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that they are confiscatory and deprive the appellant of its property without due process of law, deny to the appellant the equal protection of the laws, and amount to a taking of the private property of appellant without authority of law.'

(c) On page 108 of Brief for Appellant in the latest appeal in this proceeding to the Supreme Court of Pennsylvania appears the following:

'On the contrary, it is contended that the question of damages and who is entitled thereto is definitely substantive and that to refuse to apply the provisions of the Public Service Company Law of 1913 amounts to confiscation and a violation of Section 1, Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it deprives the Appellant of its property without due process of law and further denies to appellant the equal protection of the laws.'

(d) Paragraph 7 of the Petition of Appellant for Re-argument filed in the Supreme Court of Pennsylvania provides as follows:

'7. That your petitioner is advised, believes, and therefore avers that the determination of your Honorable Court as set forth in its said Per Curiam opinion of December 2, 1946, is arbitrary, unlawful and in contravention of the 14th Amendment of the Constitution of the United States and of the 1st and 10th Sections of the 1st Article of the Constitution of Pennsylvania, in that it is confiscatory and deprives the appellant of its property without due process of law, denies to the appellant the equal protection of the law, and amounts to a taking of the

private property of appellant without authority of law; and that the said Per Curiam opinion of your Honorable Court is particularly contrary to the principle enunciated by the Supreme Court of the United States in Arizona Grocery Co. *vs.* Atchison, T. and S. F. Rwy, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 384.'

(e) The said question was also clearly raised in the Assignments of Error filed with the Superior Court of Pennsylvania (page 20 of Brief for Appellant filed in the Supreme Court of Pennsylvania) and also in the Brief of Appellant filed with the Superior Court of Pennsylvania (page 56 of the brief for appellant filed with the Supreme Court of Pennsylvania)."

but was decided adversely to the contention of petitioner without a specific discussion of the constitutional question.

GEORGE HENRY HUPT,
Counsel for Appellant.

APPENDIX

Opinion of the Supreme Court of Pennsylvania

(Reported 355 Pa. 377)

Per CURIAM, December 2, 1946:

At the argument of this appeal from the decision of the Superior Court, reported in 159 Pa. Superior Ct. 59, counsel for the appellant frankly stated that the purpose of the appeal was to obtain reconsideration and reversal of our decision in the case between the same parties reported in 344 Pa. 366. We have so considered the appeal and affirm the judgment on the opinion of President Judge Baldrige of the Superior Court.

Opinion of the Supreme Court of Pennsylvania

(Reported 344 Pa. 366)

OPINION by Mr. Justice PARKER, March 23, 1942:

This is an appeal by the Cheltenham & Abington Sewerage Company from an order of the Superior Court (146 Pa. Superior Ct. 274, 22 A. 2d 37) modifying an order of the Public Utility Commission (successor to the Public Service Commission) finding that the rates of that company were unreasonable, oppressive and extortionate from October 17, 1933, to January 1, 1937, and directing that reparations should be awarded for that period. The principal matter to be determined in this appeal is the earliest date from which reparations may be allowed on account of any claims made in this proceeding.

On October 6, 1930, the Public Service Commission, acting on a complaint and after hearing, directed the company to file and publish a tariff for sanitary sewerage service to yield an annual gross revenue not in excess of $36,140.00: 10 Pa. P. S. C. 502. A tariff intended to produce that rate was filed and approved by the Commission on April 13, 1931, to be effective July 1, 1931. The commission on December 11, 1934, on its own motion, by authority of Art. V,

section 3 of the Public Service Company Law, Act of July 26, 1913, P. L. 1374, instituted a proceeding inquiring into the fairness, reasonableness and justness of the rates provided by the existing tariff. This resulted in an order as to future rates dated August 30, 1935, fixing the annual allowable revenue at a maximum of $27,700. On appeal the Superior Court (Cheltenham & Abington S. Co. *v.* P. S. C., 122 Pa. Superior Ct. 252, 186 A. 149) by opinion filed July 10, 1936, increased the allowable annual gross revenue to $30,050.00. An allocatur was refused by this court. Thereupon the commission filed a report and order directing a new tariff to be filed effective January 1, 1937, in accord with its previous order as modified by the Superior Court. The company collected rates under the old tariff to that time.

On October 17, 1935, a complaint was filed with the Commission by Benjamin H. Davis, et al., under Art. V, section 5 of the Public Service Company Law to recover reparations for damages alleged to have been sustained by reason of the collection by the company of rates set forth in the tariff effective July 1, 1931. The commission, after hearing, found that reparations should be awarded from October 17, 1933,* to January 1, 1937. On appeal the Superior Court held that the complainants were not entitled to receive compensation for a period prior to December 11, 1934, the date on which the proceedings to fix future rates were initiated by the commission. It is the contention of the appellant that since the rates collected by it were imposed by virtue of a commission-made rate no reparations may be awarded prior to the effective date of the new tariff, January 1, 1937; in short, that the complainants are not entitled to any reparations. We do not agree with either this contention or the position of the Superior Court, but are of the opinion that the right to reparations does not extend to a period prior to August 30, 1935, the date on which the commission filed its order directing a reduction in allowable gross revenue.

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* The statutory limit of two years prior to filing claim fixed by said Para. 5.

The rates prescribed by the commission in 1931 after hearing were "commission-made" rates as that term is used in utility law. The rates so fixed could not be other than commission-made rates for that agency fixed the rate base and after estimating an amount allowable for expenses of operation prescribed the gross annual revenue which the utility should collect. We do not regard it of any significance that the tariffs designed to yield the specified gross annual revenue were prepared by appellant and approved by the Commission rather than that they were set by the commission in the first instance. This was a mere matter of procedure. While the company was permitted to prepare the schedule it was approved by the Commission as being in accord with their prior order. The company consequently was entitled to rely upon the declaration of the commission as to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi legislative capacity.

Mr. Justice Roberts in the leading case on the subject (Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry., 284 U. S. 370, 386-389, 52 S. Ct. 183) said: "When . . . the (Interstate Commerce) Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action. . . . As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and, if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." The same principle was followed in this state by the Superior Court: Penna. R. R. Co. *v.*

P. S. C., 125 Pa. Superior Ct. 558, 190 A. 367; B. & O. R. R. Co. *v.* P. U. C., 136 Pa. Superior Ct. 517, 7 A. 2d 488.

There was important distinctions between proceedings to fix future rates under section 3 of Art. V of the Public Service Company Law and those for reparations under section 5 of the same article. "The object of a rate proceeding is to prevent a public wrong for the future; reparation redresses a private wrong of the past. The findings on the issues actually involved in the rate case furnished no basis either for awarding or refusing reparation; there has, as yet, been no specific finding that the rates were unreasonable in the past. By the express provisions of the statute nothing can be done toward the redressing of the wrong suffered through the exaction of unreasonable rates until the commission, after hearing, 'shall determine that any rates which have been collected . . . were . . . unreasonable,' et cetera. A question of reparation cannot properly be determined by the commission until it has been presented to it in the manner prescribed by the act, nor should it be prejudiced, or the door closed against it, by a declaration in advance of a hearing": Centre Co. Lime Co. *v.* P. S. C., 96 Pa. Superior Ct. 590, 599; 103 Pa. Superior Ct. 179, 157 A. 815. Also see New York & Penna. Co. *v.* N. Y. C. R. R. Co., 267 Pa. 64, 100 A. 286. Nevertheless a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission. The utility was entitled to reply on the order of 1931 until August 30, 1935, but thereafter might be liable for reparations.

At what date did the tariff of 1931 cease to protect the company from claims for reparations? We are of the opinion that protection extended to August 30, 1935, the date when the commission, acting under the authority granted to it by the legislature, declared that the former controlling rates were unreasonable and should be reduced. The appellant then knew that the commission after full hearing had determined that the rates were too high. It knew that the legislature had delegated to the commission power and authority to act for it and make that determina-

tion as well as the power to make an order for reparations. In prior decisions the Superior Court properly so held: Penna. R. R. Co. *v.* P. S. C., supra; B. & O. R. R. Co. *v.* P. U. C., supra.

The company, appellant, argues that since the order of the Public Utility Commission made August 30, 1935, was appealed to the Superior Court and was modified by that court on July 10, 1936, and the tariff pursuant to that order was not effective until January 1, 1937 (application for an allocatur in the meantime having been made to and refused by the Supreme Court), the old tariff of 1931 entitled it to collect the rates fixed by it until the new tariff was effective. The Superior Court properly rejected that contention. If that theory is sound the complainants would be deprived of any right to claim reparations. It was the Public Service Commission to whom the legislature delegated the authority to determine and fix just and reasonable rates to be charged by certain utilities. In acting under that authority the commission performed a quasi legislative function and its decision, as in all rate cases, is in effect an enactment which remains the law until it is changed by the legislature acting directly or through its agent the commission. Consequently, when the commission determines an existing rate to be unjust and unreasonable that change has the same effect as any other change in the law by the legislature. The mere fact that the courts may review decisions of the commission does not affect the fact that there has been an actual change in the law insofar as it affects the particular utility. The review of orders of the commission by the courts is a judicial function whereby it is determined whether the commission has acted within its delegated powers and within the constitution.

When the commission on August 30, 1935, determined that the rates were unjust and unreasonable that constituted a new enactment fixing the relative rights of the utility and its customers. So far as the decision of the commission was lawful it remained in force as of August 30, 1935. On that date the utility had notice that if it continued to collect for service under the old tariff it might

be called upon to account by way of reparations. The mere fact that the order was subject to review did not affect that result. The situation is comparable to that which exists when the constitutionality of an act of the legislature is challenged by an appeal to the courts. If the act is sustained it remains effective as of the date originally fixed by the legislature. Just so here, the protection which the company enjoyed under the tariff of 1931 ceased as of August 30, 1935. The delay necessitated by appeals to the courts, often covering a long period, should not be allowed to prejudice the rights of customers of the utility unless the law demands such an interpretation, when in the end a change is sustained as was the case here.

The Superior Court, however, in part sustained the view of the Commission and held that the initiation of an investigation by the commission of the justness and reasonableness of the rates constituted a change and served as a warning to the utility by reason of special circumstances to which we have not heretofore referred.

When the rates were fixed by the commission in 1930 appellant had a contract with Cheltenham Township for sewage disposal calling for a fixed sum per year plus a proportionate part of any amount the township might have to pay the City of Philadelphia for conveyance of sewage through the latter's sewers. The exact obligation under this contract being in doubt, the commission in its opinion stated: "Under these circumstances the amount claimed by respondent, $10,940 will be allowed until the exact amount is determined, at which time a rate adjustment, if necessary, can be made." It developed that the allowance was $3,000 too high. Nothing was done by the commission until 1934 when it initiated the proceeding to determine the fairness and justness of the appellant's rates. At that time the whole subject of rate base and allowable expenses was investigated and the final result reached was dependent only in part upon a reduction in the amount allowable for payment to Cheltenham Township for disposal of sewage.

The commission in 1931 not only made an order intended to furnish a basis for a tariff but it joined the utility in pre-

scribing such a tariff and allowed it to remain unchanged for about three and one-half years. The tariff became binding on utility and customer until circumstances required a reexamination of the subject and a conclusion was reached or the company filed a new tariff. It might have developed that the rates fixed were too high or too low and either the customer or the utility might profit by the errors of judgment. It is true that here experience demonstrated that the rates were too high but that is not an unusual situation. It is inevitable that in any rate making proceeding few factors can be determined with exactness and when an error appears it may affect adversely either customer or utility. The commission merely referred in its report to the item of rental to be paid to the township without pretending to make any specific reservation of the matter. It recited the fact that a change on that account might or might not be necessary. When the commission did institute a new investigation, it did not confine its attention to the actual amount paid for rental but explored the entire field usually covered in rate making inquiries. The result of the proceeding was that the annual allowable revenue was reduced in an amount approximately double the excess collected for rental. Insofar as the change arose from other matters than excess on account of rental the situation was just the same as in other cases involving a commission-made rate. Rates having in other respects the attributes of commission-made rates do not lose their effect as such by an indefinite expression of opinion that some of the factors on which they are based are variable and may not stand a pragmatic test, a situation which is always implied.

To sustain the position of the Superior Court would be to give a retroactive effect to the order of August 30, 1935, without notice to the utility. The mere institution of an inquiry did not constitute notice that a departure would be made from the tariff established by the commission in its quasi legislative capacity. The situation is comparable to the introduction of a bill in the legislature. It may or may not become a law. Here the first notice to the utility that the rates were too high was on August 30, 1935.

The order of the commission must be modified by fixing August 30, 1935, as the earliest date from which the Cheltenham & Abington Sewerage Company is liable for reparations.

The decree of the Superior Court is affirmed as modified, the costs of this appeal to be divided equally between the appellants and the complainants.

(16)